APPENDIX D

[Filed Oct. 8, 1999]

NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DAMION EDWARD MOORE, Defendant and Appellant.	E022512 (Super.Ct.No. CR 60589) OPINION
THE PEOPLE, Plaintiff and Respondent, v. CLIFTON MAXWELL, Defendant and Appellant.	E022548 (Super.Ct.No. CR 60589)
In re CLIFTON MAXWELL on Habeas Corpus.	E023541 (Super.Ct.No. CR 60589)

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge.

Affirmed.

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Patrick F. Magers, Judge. Petition denied.

Robert Wayne Gehring, under appointment by the Court of Appeal, for Defendant and Appellant Damion Edward Moore.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant Clifton Maxwell.

Bill Lockyer, Attorney General, David P. Druliner, Chef Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Esteban Hernandez, Supervising Deputy Attorney General, and Lora Fox Martin, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction

Defendants Damion Edward Moore (Moore) and Clifton Maxwell (Maxwell) appeal convictions for first-degree and armed second-degree murder respectively. Defendants Moore and Maxwell were tried jointly before separate juries. The Moore jury acquitted a third codefendant, Mark Baker. The court sentenced Maxwell to *25* years to life and Moore to 20 years to life.

On appeal, Maxwell raises several issues regarding (1) his competency to stand trial, (2) his refusal to wear a "React" belt, and (3) the medication he received (or refused) during trial. Additionally, Maxwell collaterally attacks the judgment by a petition for writ of habeas corpus, which also addresses the latter two issues. Moore asserts instructional error. We affirm the judgments and deny Maxwell's petition summarily.

2. Facts

On December 27, 1994, defendant Maxwell learned that his car, a white Chevrolet Monte Carlo, was missing from his stepfather's garage, where the car had been parked.

In a first attempt to recover the car, defendant Maxwell, Timothy Potts (Potts), and two others went armed to Eugene Miller Bender's house, in the belief that the car was located there. The car was not there but some gunfire occurred and a man named David Jackson (Jackson) was shot but not killed.

Next, on December 29, 1994, Maxwell called Potts and said he had found the car. He asked Potts to obtain a tow truck. Then five men--including defendants Maxwell, Moore, and Mark Camilloe Baker (Baker), Basil Chad Maxwell (Basil), and Potts--drove in two vehicles to the residence of Jerry Jefferson (Jefferson). Potts, Moore, and Baker were armed.

Jefferson came out of the house to meet Potts. Jefferson was cooperative and did not object to the car being taken. Nevertheless, Moore hit him with a rifle barrel and two shots were fired at Jefferson as he ran toward the house. Potts found the missing car, without wheels, in the garage. Potts heard more shots from the house, where he saw Moore and Baker shooting at something Potts could not see. Finally, Potts left the scene with the others.

Baker testified that he saw Moore and Jefferson wrestling over a shotgun and then heard a shot.

Jefferson was found dead in his bedroom. He had been shot four times, twice each from two weapons of different calibers.

3. Maxwell's Competency to Stand Trial

In May 1996, pursuant to Penal Code section 1368, defense counsel requested a hearing to determine defendant Maxwell's mental competency to stand trial. Five psychiatrists evaluated Maxwell. Four found him to be competent and one did not. On December 16, 1996, the trial court found defendant competent to stand trial and reinstated criminal proceedings.

In January 1998, defense counsel informed the court several times that he was concerned about defendant's ability to stand trial because he was deteriorating, he was housed in the jail's psychatric unit, and he was not communicating with defense counsel. The court was informed by a sheriff's deputy that defendant was the subject of numerous Welfare and Institutions Code section 5150 evaluations and that he was refusing his antipsychotic medication.

The court concluded defendant was malingering and trying to feign a psychotic mental state. The court refused to suspend proceedings.

Later defense counsel said that defendant was on suicide watch and would not cooperate to allow his attorney to prepare an opening statement. The court announced that defendant had been found in possession of a razor blade and transferred to the hospital for a 72-hour evaluation under Welfare and Institutions Code section 5150. The court still found defendant was a malingerer and feigning mental illness. It further found that no Penal Code section 1368 defense motion was pending, that defendant was competent to stand trial, and defendant was excusing hunself from trial pursuant to Penal Code section 1043.

Defendant resisted coming to court, was disruptive, and refused to wear the React belt. At one point, pursuant to

Welfare and Institutions Code section 5250, he was certified by two psychiatrists for a 14-day hold at the hospital. But, in spite of his condition, defendant's doctors continued to release him to appear in court. Defense counsel declined to request a second competency hearing pursuant to Penal Code section 1368. The trial court continued to find that defendant was malingering and was competent to stand trial.

On appeal, defendant Maxwell argues that the court erred in not reassessing his competency to stand trial in January 1998. It violates the constitutional right of due process to convict an incompetent person. (*People* v. *Hale* (1988) 44 Cal.3d 531, 539, citing *Pate* v. *Robinson* (1966) 383 U.S. 375, 377.) Defendant has the burden of proof on the issue of competency (*People* v. *Medina* (1995) 11 Cal.4th 694, 734-735) but when he comes "'forward with substantial evidence of present mental incompetence, he is entitled to a section 1368 hearing as a matter of right . . . .'" (*Hale*, *supra*, at p. 539 citing *People* v. *Pennington* (1967) 66 Cal.2d 508, 518.) If a defendant has already been determined to be competent, the trial court need not suspend proceedings to conduct a second competency hearing unless it is presented with evidence of a substantial change in circumstances or with new evidence casting serious doubt upon the validity of the previous finding of competency. (*People* v. *Medina*, *supra*, 11 Cal.4th at p. 734; *People* v. *Jones* (1997) 15 Cal.4th 119, 150, overruled on another point by *People* v. *Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Here, in order to show a change of circumstances or new evidence, defendant relies primarily upon information contained in a "Notice of Certification," pursuant to Welfare and Institutions Code section 5250, dated January 15, 1998. That notice, however, was not part of the record below. Defendant attempts to make it part of the record on appeal by a request for judicial notice filed October 7, 1998. We deny the request as it pertains to the "Notice of Certification" for

the several reasons stated in the People's opposition, filed October 22, 1998, pp. 4-5.[1] Therefore, to the extent defendant relies upon the "Notice of Certification," we reject his arguments that the trial court was presented with evidence of a change of circumstances or new evidence of incompetency.

Defendant also argues that changed circumstances or new evidence was shown by other evidence in the record of (1) repeated Welfare and Institutions Code section 5150 evaluations and (2) the concerns expressed by defense counsel about defendant's ability to cooperate with or contribute to his defense. In *People* v. *Medina*, *supra*, 11 Cal.4th at pp. 734-735, the court held that cursing and disruptive conduct, affmative efforts to appear psychotic, and unwillingness to participate in one's defense do not constitute substantial evidence necessitating a second competency hearing. Furthermore, where defense counsel expressly refuses to question defendant's competency, there is no substantial evidence to justify a second competency hearing. (*Adams* v. *Wainwright* (11th Cir. 1985) 764 F.2d 1356, 1360.)

Defendant Maxwell's reliance on Penal Code section 1367.1 is completely inappropriate since that section only applies in misdemeanor proceedings. (Pen. Code, § 1367, subd. (b).)

The record amply supports the trial court's decision and the exercise of its discretion with respect to the issue of

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1. The "Notice of Certification" is also attached as exhibit H to defendant's petition for writ of habeas corpus. For the reasons stated here, we deny the petition. Therefore, the notice is not part of the record on appeal and was not, in any case, properly authenticated by the request for judicial notice or the petition.

defendant's competency. (*People* v. *Frye* (1998) 18 Cal.4th 894, 951-953.)

4. The React Belt

On appeal and in his petition, defendant Maxwell argues that the trial court erred in ordering him to wear a React belt,[2] a security device whlch administers an electric shock to the wearer, as a condition of defendant being present at trial. In particular, defendant contends that the belt constitutes a psychological restraint which impaired his right to be present and to communicate with counsel. Defendant additionally asserts that the court prejudicially erred because: (1) the belt was an unnecessary restraint (Pen. Code, § 688); (2) the court delegated the decision to use the belt to the sheriff's department; and (3) the court failed to consider the alternative of concealed leg braces.

Defendant refused to wear the belt and, thus, did not attend trial. In his petition, defendant cites additional evidence to show that he was afraid to wear the belt (1)

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2. "React" stands for "Remote Electronically Activated Control Technology." (Nieto Dahlberg, S. "The React Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions." 30 St. Mary's L.J. 239, 242.) A description of the React belt appears in *People* v. *Garcia* (1997) 56 Cal.App.4th 1349, 1354: "The belt will deliver 50,000 volts of electricity if activated by a remote transmitter that is controlled by an attending officer. This shock will immobilize the wearer and may create a '[p]ossibility of self-defecation' and a '[p]ossibility of self-urination[.]'" A prisoner notification form states the belt could be activated if the wearer engages in: "'A. Any outburst or quick movement [¶] B. Any hostile movement [¶] C. Any tampering with the belt [¶] D. Failure to comply with verbal command for movement of your person [given by an officer]."

because he knew another prisoner who had been accidentally shocked by the belt and (2) because defendant was taking medication that could have caused involuntary movements and subjected him to being shocked.

None of defendant's arguments, or the evidence supporting them, was raised below. Although defendant refused to wear the belt, defense counsel did not object to its use. Therefore, defendant has waived the right to raise any such grounds on appeal and his habeas petition is procedurally barred. (*People* v. *Tuilaepa* (1992) 4 Cal.4th 569, 583; *People* v. *Slankewirz* (1990) 51 Cal.3d 72, 95, fn. 9; *People* v. *Duran* (1976) 16 Cal.3d 282, 289; *People* v. *Garcia*, *supra*, 56 Cal.App.4th at pp. 1356- 1357.)

Furthermore, the argument that the belt constituted a psychological restraint was rejected in the *Garcia* case. (*People* v. *Garcia*, *supra*, 56 Cal.App.4th at pp. 1356- 1357.) Defendant tries to argue that this case differs from *Garcia* because of defendant's purported incompetency. But we have held that the court's ruling on the issue of competency was correct. Therefore, we find no credible distinction to be made from *Garcia*. And, just as in *Garcia*, any argument that defendant may have been psychologically restrained by the belt is pure speculation, given that defendant did not wear the belt or attend trial.

5. Involuntary Medication

Both on appeal and in his petition, Maxwell argues that the trial court erred by not conducting a hearing to determine the need for the involuntary administration of psychotropic medication. (*Riggins* v. *Nevada* (1992) 504 U.S. 127, 135.) Defendant did not raise ths issue below, possibly because one difficulty with the argument is the absence of any evidence that defendant was drugged by force. The only facts before the trial court were that defendant was refusing sometimes to

take his medication. The unauthenticated medical records presented as evidence in support of the petition are inconclusive on this point. Maxwell's declaration, states that he was forcibly administered Thorazine but the medical records mention only Haldol and other drugs, not Thorazine. And the medical records do not state that Haldol and the other drugs were administered forcibly.

This is not a case in which the record provides a basis on which to argue that defendant was denied due process because of the forced administration of drugs: "Assuming for the purpose of argument that a person who has not been judicially determined to be incompetent must furnish informed consent before being treated with antipsychotic drugs [citation], and assuming further that the state would bear the burden of proving such informed consent in the event the administration of such drugs were challenged, the state bore no such burden in the present case, because defendant did not raise the issue in the trial court." (*People* v. *Jones*, *supra,* 15 Cal.4th at pp. 154-155.)

Furthermore, "Defendant cites no authority, and we are aware of none, that would require the state to demonstrate, sua sponte, that a criminal defendant has furnished informed consent for any antipsychotic medications provided by the state." (*Id.*, at p. 155.)

On this issue, Maxwell's appeal and petition fail both procedurally and on the merits.

6. Instructional Error

Defendant Moore makes one argument, that the court erred when it gave the People's requested special jury instruction as follows:

"Those who aid and abet a crime and those who directly perpetrate the crime are principals and equally guilty of the commission of that crime. You need not unanimously agree, nor individually determine, whether a defendant is an aider and a bettor or a direct perpetrator.

"The individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other."

Defendant Moore argues that the instruction improperly directed the verdict against him on the ultimate issue of whether he was guilty of murder. He contends that the instruction states "that there is no doubt that Mr. Moore is either an aider and abettor or a direct perpetrator" and that "each juror may decide Mr. Moore is guilty without having to decide for themselves whether he is an aider and abettor or a direct perpetrator." As also stated in appellant's opening brief: "The plain meaning of the court's words was that there could be no doubt that by one theory or the other, Mr. Moore was guilty of murder. This was error of constitutional dimensions."

As acknowledged by defendant, the subject instruction was based on language from *People* v. *Santamaria* (1994) 8 Cal.4th 903, 919, in which the California Supreme Court held that jurors need not be unanimous in deciding whether a defendant is a direct perpetrator or an aider and abettor when returning a guilty verdict, so long as each juror believes defendant, beyond a reasonable doubt, to be guilty of the crime charged. This is a correct statement of the law. (*People* v. *Champion* (1995) 9 Cal.4th 879, 931; *Schad* v. *Arizona* (1991) 501 U.S. 624, 624.)

Furthermore, we have read the subject instruction and do not find that it can reasonably be interpreted in the strained manner suggested by defendant. The instruction does not tell the jury that defendant was either a perpetrator or an aider and abettor. Nor does the instruction tell the jurors that they do not need to decide whether he was one or the other. The instruction clearly states that each individual juror must decide whether defendant committed the offense as either a perpetrator or an aider and abettor. There was no error in giving the subject instruction.

7. Disposition

We affirm the judgments against defendants Maxwell and Moore and dismiss Maxwell's petition for writ of habeas corpus.

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s/Gaut
J.

We concur:

s/Ramirez
P.J.

s/Ward
J.